

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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JEROME SPADE,	:	CIVIL ACTION
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Plaintiff,	:	
	:	
v.	:	NO. 01-3349
	:	
STAR BANK, et al.,	:	
	:	
Defendants.	:	
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**MEMORANDUM**

Robert F. Kelly, Sr. J.

November 6, 2002

Before this Court are three Motions for Summary Judgment filed by Defendants Donald C. Molton, Jr. ("Molton"), Robert Half International, Inc. ("RHI") and Clifford Crowley ("Crowley"). Plaintiff, Jerome Spade ("Spade"), brought this action pursuant to 26 U.S.C. § 6672(d), seeking contribution from the Defendants for payment of a tax penalty assessed against him. Spade's lawsuit also includes state law claims for breach of employer's duty of care, negligence, misrepresentation and breach of contract. For the following reasons, the Motions are granted.

**I. Factual Background**<sup>1</sup>

Spade was employed as an accountant temp for RHI, a temporary employment agency. In April 1993, RHI placed Spade at Heintz Corporation ("Heintz"). While Spade was

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<sup>1</sup> The Complaint fails to include a fact section. As a result, the Court has taken the following facts from the exhibits attached to Defendants' Summary Judgment Motions and Plaintiff's Responses to said Motions. For purposes of these Motions for Summary Judgment, the Court must accept the "evidence in the light most favorable to the non-movant, giving that party the benefit of all reasonable inferences derived from the evidence." Waldron v. SL Indus., Inc., 56 F.3d 491, 496 (3d Cir. 1995)(citation omitted).

acting as Heintz's Chief Financial Officer ("CFO"), Heintz failed to make its payroll tax payments. At the end of July 1993, RHI terminated Spade's employment because of Heintz's failure to pay RHI for its services. At this time, Spade was hired as a full-time employee for Heintz. On or about August 4, 1993, Heintz filed for Chapter 11 bankruptcy. Spade ceased being Heintz's CFO in September 1995.

By letter dated September 28, 1996, the Internal Revenue Service ("IRS") informed Spade that he was being assessed for the 1993 unpaid payroll taxes by Heintz. The IRS was legally allowed to seek payment from Spade in accordance with 26 U.S.C. § 6672(a). Section 6672(a) provides that individuals who were required to collect, account for, and pay taxes for a business may be personally liable for a penalty if the business fails to pay the owed taxes. 26 U.S.C. § 6672(a). According to the IRS, the amount of Heintz's unpaid taxes was \$ 25,999.86, however, due to accrued penalties and interest, the assessment against Spade amounted to \$ 123,826.01.<sup>2</sup> Spade contested his responsibility for the assessment against him. Following litigation, Spade and the IRS reached a settlement on March 16, 2000. The general terms of the settlement required Spade to pay \$12,500 according to a payment plan concluding with a final payment to be paid in August 2000. Under the terms of the plan, Spade would be severely penalized for any missed payments. In August 2000, Spade successfully paid off the \$12,500 without any penalties. In connection with the IRS litigation and settlement, Spade states that he has paid an additional \$10,500 in attorney's fees.

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<sup>2</sup> The final IRS assessment of \$ 25,999.86 related to Heintz's unpaid payroll taxes for the last week of June 30, 1993 and the first week of July 1993.

On or about March 16, 2001, Spade filed suit in the Philadelphia Municipal Court for \$10,000 against Star Bank, N.A. (“Star Bank”), Ralph D. Ketchum, Molton and Phillip Rice. Spade dismissed the action. On July 2, 2001, Spade filed the instant action against the aforementioned adding the following as defendants: RHI, Heintz, James Doyle, Empire Management Group, Inc. (“Empire Management”), Crowley and Grisanti, Galef & Goldress, Inc. (“GGG Inc.”).<sup>3</sup> An arbitration hearing on this case was held on June 5, 2002. On June 6, 2002, an arbitration award was entered.

Spade requested a trial de novo on July 1, 2002. On this same date, Spade filed a Motion for Summary Judgment Against RHI. RHI’s response to Spade’s motion included a Cross-Motion for Summary Judgment. Spade’s Motion for Summary Judgment Against RHI was denied on September 11, 2002. The Court is currently addressing RHI’s Cross-Motion for Summary Judgment. In addition, the Court is also addressing the Motions for Summary Judgment filed by Molton and Crowley.

## **II. Legal Standard**

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper “if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). Essentially, the inquiry is “whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). The moving party has the initial burden of informing

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<sup>3</sup> On February 8, 2002, the Court issued an Order dismissing Heintz, Empire Management and GGG Inc. due to Spade’s lack of prosecution for failure to make service of complaint. (Dkt. No. 29 (Court Order)).

the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present “specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

### **III. DISCUSSION**

#### **A. 26 U.S.C. § 6672<sup>4</sup>**

By law, employers must regularly withhold federal income and Social Security taxes from their employees’ wages. Luce v. Luce, 119 F. Supp.2d 779, 783 (S.D. Ohio

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<sup>4</sup> 26 U.S.C. § 6672, the “Trust Fund Recovery Penalty” provision, is a collection device designed to ensure that unpaid trust fund taxes are paid, if not by the defaulting corporate employer, then by those persons responsible for the default. Smith v. United States, 894 F.2d 1549, 1553 (11th Cir. 1990).

2000)(citing 26 U.S.C. §§ 3101-02, 3402). The taxes withheld from each employee's wages constitute a special fund held in trust under the Internal Revenue Code ("IRC") for the exclusive use of the United States. See 26 U.S.C. § 7501. On a quarterly basis, these taxes are collected from employers. Luce, 119 F. Supp.2d at 783. "The withholding taxes are not a mere debt, but 'are part of the wages of the employee, held by the employer in trust for the government.'" Id. (quoting Gephart v. United States, 818 F.2d 469, 472 (6th Cir. 1987); 26 U.S.C. § 7501(a)). If these taxes are not paid at the end of each quarter, the government does not have any recourse against individual taxpaying employees. Id. However, "if these taxes are not paid at the end of each quarter, federal law imposes a 100 % penalty tax on any person who willfully fails to collect, truthfully account for, and pay over these taxes." Id. (citing 26 U.S.C. § 6672)(footnote omitted).

According to 26 U.S.C. § 6672(a), "[t]he IRS is authorized to assess and collect a trust fund recovery penalty from any officer or employee of any corporation who is responsible for collecting, accounting for, and paying over any tax imposed by the Internal Revenue Code and who willfully fails to do so." United States v. Bisbee, 245 F.3d 1001, 1005 (8th Cir. 2001)(citing 26 U.S.C. §§ 6671(b) and 6672). Section 6672(a) of the IRC provides:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a). Thus, Section 6672(a) allows a 100 percent assessment of a penalty against any person responsible for the payment of payroll taxes who willfully fails to pay such taxes. Id.

After payment of the penalty, the statute allows the “responsible person” to seek contribution from any other responsible party who would be liable for the unpaid tax. See 26 U.S.C. § 6672(d). Specifically, Section 6672(d) provides, in part:

If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person’s proportionate share of the penalty.

26 U.S.C. § 6672(d). Thus, if more than one person is liable for the penalty for unpaid withholding taxes, Section 6672(d) provides a federal right to contribution or indemnification. Id.

### **1. Contribution Pursuant to 26 U.S.C. § 6672**

Under Section 6672, “[p]ersonal liability . . . properly is imposed upon the person or persons who were: ‘(1) responsible for collecting, accounting for, and remitting payroll taxes, and (2) who willfully failed to do so.’” In re Sheppard, 253 B.R. 397, 403 (Bkrtcy. D.S.C. 2000)(quoting Plett v. United States, 185 F.3d 216, 218 (4th Cir. 1999); 26 U.S.C. § 6672))(citations omitted); see also Quattrone Accountants, Inc. v. I.R.S., 895 F.2d 921, 927 (3d Cir. 1989). Thus, in order to set forth a claim for contribution against others, a person must show that the others are (1) a “responsible person,” and (2) they “willfully failed to collect or truthfully account for and pay over” the payroll taxes. Quattrone, 895 F.2d at 927 (citation omitted).

#### **a. “Responsible Person” Under Section 6672**

For purposes of Section 6672(a), a “responsible person” is defined as an individual “who is ‘required to collect, truthfully account for or pay over any tax due to the United States.’” Greenberg v. United States, 46 F.3d 239, 242- 43 (3d Cir. 1994)(quoting United

States v. Carrigan, 31 F.3d 130, 133 (3d Cir. 1994)). “‘Responsibility is a matter of status, duty, or authority, not knowledge.’ While a responsible person must have significant control over the corporation’s finances, exclusive control is not necessary.” Id. at 243 (quoting Brounstein v. United States, 979 F.2d 952, 954 (3d Cir. 1992))(quotation marks and citation omitted). It is not required that the responsible person be a corporate officer. Quattrone, 895 F.2d at 927 (citation omitted). “A person is responsible if the person has significant, though not necessarily exclusive, control over the employer’s finances.” Id. (citation omitted). “A person has significant control if he has the final or significant word over which bills or creditors get paid.” Id. (citation omitted). It is important to note that “[t]here can be more than one responsible person for a given employer.” Id. at 926 (citation omitted). “That another person also may be liable under Section 6672 does not affect the liability of the person presently subject to suit.” Id. (citation omitted). When determining whether an individual is a responsible person, courts also consider the following factors:

(1) contents of the corporate bylaws, (2) ability to sign checks on the company’s bank account, (3) signature on the employer’s federal quarterly and other tax returns, (4) payment of other creditors in lieu of the United States, (5) identity of officers, directors, and principal stockholders in the firm, (6) identity of individuals in charge of hiring and discharging employees, and (7) identity of individuals in charge of the firm’s financial affairs.

Brounstein, 979 F.2d at 954-55 (citation omitted).

#### **b. “Willfulness” Under Section 6672**

In order for liability to attach under Section 6672, once it is proven that an individual is a responsible person, there next must be a showing that the responsible person “willfully” failed to collect, account for or pay over the withheld taxes. 26 U.S.C. § 6672(a).

“[U]nder section 6672(a), willfulness is ‘a voluntary, conscious and intentional decision to prefer other creditors over the Government.’ A responsible person acts willfully when he pays other creditors in preference to the IRS knowing that taxes are due, or with reckless disregard for whether taxes have been paid.” Greenberg, 46 F.3d at 244 (quoting Brounstein, 979 F.2d at 955-56)(citations omitted). “In order for the failure to turn over withholding taxes to be willful, a responsible person need only know that the taxes are due or act in reckless disregard of this fact when he fails to remit to IRS.” Id. “Reckless disregard includes failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid.” Id. (citations omitted). “The taxpayer need not act with an evil motive or bad purpose for his action or inaction to be willful.” Id. (citing Hochstein v. United States, 900 F.2d 543, 548 (2d Cir. 1990)). A willful failure to pay taxes includes “[a]ny payment to other creditors, including the payment of net wages to the corporation’s employees, with knowledge that the employment taxes are due and owing to the Government.” Id. (citation omitted).

## **2. Analysis of Section 6672 Regarding Molton, RHI and Crowley**

### **a. Molton**

Molton’s Motion for Summary Judgment is based, in part, upon the argument that Spade cannot seek contribution from him because he cannot establish that Molton is “liable for the penalty” under Section 6672(a). (26 U.S.C. § 6672(d); Molton’s Mot. Summ. J.). Molton argues that he was not a “responsible person” and never “willfully fail[ed]” to remit Heintz’s payroll taxes. (Molton’s Mem. Law Supp. Mot. Summ. J. at 5-8). Spade counters Molton’s argument with the contention that Molton was a “responsible person,” however, he fails to address Molton’s argument that he never “willfully fail[ed]” to remit Heintz’s payroll taxes.

(Spade’s Mem. Law Ans. Molton’s Mot. Summ. J.). For the following reasons, the Court concludes that Spade cannot seek contribution from Molton pursuant to Section 6672(d) because he has not shown that Molton is a “responsible person” who “willfully failed to collect or truthfully account for and pay over” Heintz’s payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

In 1993, Molton was a Vice President of Key Equity Capital (“Key Equity”). Key Equity had invested in RDK Aerospace Inc. (“RDK”), which, in turn, had invested in Heintz. (Molton’s Mem. Law Supp. Mot. Summ. J. at 2, Ex. A (Molton’s Decl.)). On behalf of Key Equity, Molton’s involvement with Heintz was to monitor Key Equity’s investment in Heintz. (Id. at 3). In connection with this role, Molton attended periodic meetings with the officers of RDK and consultants retained to manage subsidiary companies. (Id.). The purpose of these meetings was to monitor the performance of the business, discuss and evaluate the viability of the company, and review options to maximize the value of Key Equity’s investment, including the possibility of selling various assets. (Id.).

Molton was not a stockholder, director, officer, or employee of Heintz and was not involved in its day-to-day operations. (Id. at 2-3). Molton states that he did not, and could not, sign checks, pay bills, or transfer funds for Heintz, and he did not know, and could not decide, which bills would be paid. (Id. at 3). Molton neither handled payroll nor did he prepare, sign or file tax returns for Heintz. (Id.). Molton admits that he was aware that Heintz was experiencing financial difficulty, but he states that he did not know, and he had no reason to believe, that the payroll taxes were not being paid. (Id. at 8). Molton states that he was unaware of Heintz’s failure to pay its taxes until Spade sued him in the Philadelphia Municipal Court. (Id. at 3). Accordingly, Molton argues Spade cannot seek contribution from him because he is

unable to show that Molton was a “responsible person” who “willfully fail[ed]” to pay taxes pursuant to Section 6672(a). 26 U.S.C. § 6672(a).

Spade counters Molton’s argument with the assertion that Molton was, in fact, a “responsible person.” (Spade’s Mem. Law Ans. Molton’s Mot. Summ. J.). Relying upon his own affidavit and exhibits, Spade argues that Molton was more involved in Heintz’s operations than he admits.<sup>5</sup> (Id.). In support of his argument, Spade’s affidavit states “[t]o the best of my knowledge, Donald C. Molton, Jr. was involved in some of the [] day to day operations of Heintz Corp.” (Id., Ex. A, ¶ 2 (Spade’s Decl.)). As for Spade’s exhibits, they include three memoranda showing that Molton was involved in negotiating a management agreement and eventual purchase and sale agreement with Empire Management. (Id., Exs. B, C and D).

Based on the aforementioned, the Court concludes that Spade has failed to show that Molton is a “responsible person” who “wilfully fail[ed]” to remit Heintz’s payroll taxes. Regarding the “responsible person” prong of the Section 6672(a) analysis, Spade does not provide any evidence that Molton was a “responsible person” as defined by Section 6672(a). Spade fails to offer any evidence to rebut Molton’s assertions that “[h]e was nothing more than an observer, advisor, and participant in discussions regarding the future of Heintz Corporation.” (Molton’s Mem. Law Supp. Mot. Summ. J. at 7). Spade fails to offer any evidence showing or

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<sup>5</sup> Molton argues that Spade’s affidavit and exhibits do not comport with the evidentiary standards of Federal Rule of Civil Procedure 56(e). (Molton’s Reply Br. Supp. Mot. Summ. J.). Regarding Spade’s affidavit, Molton argues that Spade’s affidavit does not “show affirmatively that the affiant is competent to testify. . . .” (Id. at 2)(citing Fed. R. Civ. P. 56(e)). As for Spade’s other exhibits, Molton argues that they are not “admissible in evidence,” but are, instead, inadmissible hearsay. (Id.)(citing Fed. R. Evid. 801, 802). Regardless of the admissibility of Spade’s exhibits, the Court finds that his Section 6672(d) claim against Molton is dismissed. That is, even if the Court considers the exhibits, it finds that Spade is unable to state a Section 6672(d) claim for contribution.

creating any genuine issue of material fact that Molton was a person who had significant control over Heintz's finances who had the final, or significant, word over which bills or creditors got paid. Quattrone, 895 F.2d at 927. Spade has offered nothing but speculation and conjecture in alleging that Molton is accountable for contribution under Section 6672. However, Spade cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in order to survive this summary judgment motion. Williams, 891 F.2d at 460. Since Spade does not provide any evidence to show that Molton was an individual "who [was] required to collect, truthfully account for or pay over any tax due to the United States," he has failed to prove that Molton was a "responsible person" under Section 6672(a). Since Section 6672 requires a showing of "responsibility," Spade is unable to seek contribution from Molton pursuant to Section 6672(d).

Although, the Court's conclusion that Spade has failed to show that Molton was a "responsible person" ends its Section 6672(a) inquiry, the Court takes this opportunity to note that Spade has not presented any evidence whatsoever showing that Molton "willfully fail[ed]" to remit Heintz's payroll taxes. Although Molton argues that he never "willfully fail[ed]" to pay over any payroll taxes, Spade does not address Molton's argument. As a result, the Court concludes that Spade has failed to offer any evidence regarding the "willfulness" element of liability under Section 6672. Since Spade has not offered any evidence showing that Molton was a "responsible person" who "willfully failed" to pay Heintz's taxes, Molton is entitled to summary judgment regarding Spade's Section 6672(d) claim for contribution.

**b. RHI**

RHI's Cross-Motion for Summary Judgment claims that Spade is unable to establish that RHI is "liable for the penalty" under Section 6672(d). (RHI's Cross-Mot. for

Summ. J.). Specifically, RHI argues that it is not a “responsible person” who “willfully failed” to pay the delinquent Heintz taxes under Section 6672(a). (Id.). RHI contends that “there is no evidence of record that RHI was anything more than a temporary employment agency who provided Spade with the opportunity to work at defendant Heintz as a temporary employee.” (Id. at 5). Regarding the “responsible person” element of Section 6672, RHI argues that there is no evidence that RHI was a member of Heintz’s Board of Directors, RHI had any day-to-day management responsibility at Heintz, RHI participated in decisions concerning which bills of Heintz would be paid or that RHI had any signature power over Heintz’s checks. (Id.). In addition to the aforementioned argument, RHI further argues that Spade cannot prove liability pursuant to Section 6672 because he cannot prove that RHI “willfully fail[ed]” to remit Heintz’s payroll taxes. (Id.). Relying upon its status as a temporary employment agency, RHI states that it “could not have willfully failed to collect or remit the delinquent taxes to the IRS because there is no evidence of record that it had any contractual or other duty to do so.” (Id. at 6). Spade’s peculiar response to RHI’s argument is that RHI has not provided a sufficient cross-motion, but has merely provided a responsive memorandum of law to his earlier Motion for Summary Judgment against RHI. (Spade’s Answ. RHI’s Cross-Mot. Summ. J.). The Court disagrees with Spade’s assertion and finds that RHI’s Cross-Motion is procedurally proper. For the following reasons, the Court concludes that Spade cannot seek contribution pursuant to Section 6672(d) from RHI because he has not shown that it is a “responsible person” who “willfully failed to collect or truthfully account for and pay over” Heintz’s payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

Spade has failed to address RHI’s argument regarding contribution under Section

6672. After examining the record, the Court concludes that RHI was not a “responsible person” under Section 6672. There is no evidence whatsoever to show any genuine issue of material fact regarding whether RHI was a “responsible person” who “willfully failed to collect or truthfully account for and pay over” Heintz’s payroll taxes pursuant to Section 6672. The record is silent as to any hint that RHI was in anyway required to collect, truthfully account for or pay over any tax due to the United States on behalf of Heintz. Likewise, there is no evidence that RHI willfully failed to remit the delinquent taxes through reckless disregard or by making a voluntary, conscious and intentional decision to prefer other creditors over the Government. As a result, Spade has provided nothing but speculation and conjecture to support his allegation that RHI is accountable for contribution under Section 6672. However, Spade cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in order to survive this summary judgment motion. Williams, 891 F.2d at 460. Accordingly, the Court will grant RHI’s motion for summary judgment on Spade’s Section 6672 claim.

**c. Crowley**

Similar to the Motions for Summary Judgment by Molton and RHI, Crowley’s Motion for Summary Judgment is based on the argument that Spade cannot prove liability in accordance with Section 6672. (Crowley’s Mem. Law Supp. Mot. Summ. J.). Pursuant to Section 6672, Crowley argues that he was not a “responsible person” who “wilfully fail[ed]” to pay Heintz’s withholding taxes. (Id. at 4-8). Spade counters Crowley’s argument by asserting that Crowley is a “responsible person,” however, Spade fails to address Crowley’s argument regarding “willfulness” under Section 6672. (Spade’s Answ. Crowley’s Mot. Summ. J.). For the following reasons, the Court concludes that Spade cannot seek contribution pursuant to Section

6672(d) from Crowley because he has not shown that Crowley is a “responsible person” who “willfully failed to collect or truthfully account for and pay over” Heintz’s payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

Crowley is a self-employed financial consultant specializing in evaluating and assisting companies with troubled manufacturing facilities. (Crowley’s Mem. Law Supp. Mot. Summ. J., Ex. F, ¶ 2 (Crowley’s Decl)). In 1993, Crowley was employed as a consultant with GGG Inc. (Id. at 1). In March 1993, GGG Inc. agreed to assist Heintz in an attempt to improve the operating performance of the company. (Id.). At that time, Crowley was assigned as contract President of Heintz. (Id. at 2). Crowley hired Spade as Heintz’s CFO in April 1993. (Id.). GGG Inc.’s contract with Heintz was terminated on June 9, 1993. (Id. at 2). From June 9, 1993 through June 25, 1993, GGG Inc. and Crowley were replaced by Empire Management. (Id.). Subsequent to the termination of GGG Inc. and Crowley, an auditor from Star Bank determined that certain trust fund taxes had not actually been paid. (Id.). As mentioned earlier, the entire final assessment against Spade related to the unpaid trust fund payments for the last week of June 30, 1993 and the first week of July 1993, a period when Crowley had no involvement with Heintz. (Id.). Crowley and GGG Inc. were re-engaged as consultants for Heintz for the period of July 12, 1993 through September 15, 1993. (Id.). During this re-engagement, Crowley was hired to reassess whether Heintz could be reopened. (Id. at 2-3). Crowley states that, at this time, he had no involvement in the day-to-day operations of Heintz and had no ability to direct disbursements. (Id. at 3). On August 4, 1993, a Chapter 11 Petition was filed on behalf of Heintz. (Id.).

Based upon the timing of both the delinquent tax payments and Crowley’s

intermittent termination, Crowley argues that he is not a “responsible party” who “willfully failed to collect or truthfully account for and pay over” Heintz’s payroll taxes. (Id. at 4-8)(citing 26 U.S.C. §§ 6672(a) and (d)). That is, Crowley argues that during the applicable two week time period, the last week of June and the first week of July in 1993, he was not in a control position with Heintz because he and his employer had been replaced by Empire Management. (Id. at 6). During this time, Crowley states that he “had no knowledge of the failure to pay and no involvement in deciding whether the withholding taxes were paid.” (Id. at 8). Spade counters Crowley’s argument by claiming that Crowley was aware of the delinquent tax payments and that he had authority over the payments at issue. (Spade’s Answ. Crowley’s Mot. Summ. J.). Spade goes on to assert that Crowley was acting as “President of Heintz Corporation at the time taxes were not paid” and that certainly a “president of a corporation has decision making power in the day to day operation of the business. (Id. at 8).

Pursuant to Section 6672, the Court concludes that Spade has failed to prove that Crowley is a “responsible person” who “willfully fail[ed]” to remit Heintz’s payroll taxes. Spade relies on Crowley’s status as contract president of Heintz to argue that Crowley is a “responsible person,” however, he fails to offer any evidence to show or create any genuine issue of material fact that Crowley was an individual who, in actuality, “[was] required to collect, truthfully account for or pay over any tax due to the United States.” Greenberg, 46 F.3d at 243. Furthermore, Spade completely fails to offer any evidence that Crowley willfully failed to remit the delinquent taxes through reckless disregard or by making “a voluntary, conscious and intentional decision to prefer other creditors over the Government.” Id. at 244. As a result, the Court concludes that Spade’s assertion that Crowley is accountable for contribution under

Section 6672 is based upon speculation and conjecture. However, as stated earlier, Spade cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in order to survive this summary judgment motion. Williams, 891 F.2d at 460. Accordingly, the Court will grant summary judgment on Crowley’s Motion for Summary Judgment on Spade’s Section 6672 claim.      **B. State Law Claims**<sup>6</sup>

Spade’s state law claims include the following: liability for negligence; liability for misrepresentation and liability for breach of contract.<sup>7</sup> (Compl., ¶¶ 25-51). Molton, RHI and Crowley argue that Spade’s state law claims are time-barred because none of the claims were filed within the prescribed statute of limitations period. Appearing to rely upon the “discovery rule,” Spade argues that his state law claims are not time-barred by the applicable statute of limitations because he “could not initiate this suit until he was aware of his damages.” (Spade’s Mem. Law Supp. Ans. Molton’s Mot. Summ. J. at 14). Relying upon this argument, Spade states that “[h]e was not aware of the total amount of his damages until August of 2000 when the final payment [of the IRS settlement] was made.” (Id.). Accordingly, Spade argues, “since the total amount of his expenses were not known until the date of his final payment, he could not pursue his common law claims before then.” (Id. at 3).

### **1. Discovery Rule**

“As a general rule, the statute of limitations begins to run when the plaintiff’s

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<sup>6</sup> The parties agree that Pennsylvania law applies to Spade’s state law claims.

<sup>7</sup> Count II of Spade’s Complaint is entitled “Liability for Breach of Employer’s Duty of Care.” (Compl., ¶¶ 25-33). The Court is unaware of any such claim within Pennsylvania law. Upon reading of this claim, it appears that it is substantively similar to Spade’s “Liability for Negligence” claim. As a result, the Court will address Spade’s claim for negligence and will dismiss Count II of the Complaint.

cause of action accrues.” New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1124 (3d Cir. 1997)(quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 (3d Cir. 1994))(internal quotation marks omitted). Under Pennsylvania law, the discovery rule is a judicially created exception to the general rule that the statute of limitations starts to run as soon as the underlying cause of action accrues. See Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991). Under the discovery rule, the statute of limitations period begins to run when “the plaintiff has discovered or, by exercising reasonable diligence, should have discovered (1) that he or she has been injured, and (2) that this injury has been caused by another party’s conduct.” New Castle County, 111 F.3d at 1124 (citation omitted). “Once the plaintiff has discovered the injury, the statutory limitations period begins to run and the plaintiff is entitled to the full limitations period.” Id. at 1124-25 (citation omitted). The discovery rule is a “narrow exception” and should be applied in “only the most limited circumstances.” Tohan v. Owens-Corning Fiberglass Corp., 696 A.2d 1195, 1201 n. 4 (Pa. Super. 1997); Dalrymple v. Brown, 701 A.2d 164, 171 (Pa. 1997).

Under the discovery rule, “[t]he standard of reasonable diligence is objective, not subjective.” Dalrymple, 701 A.2d at 224. “The statute is tolled only if a reasonable person in plaintiff’s position would not have been aware of the salient facts.” Pitts v. N. Telecom, Inc., 24 F. Supp.2d 437, 441 (E.D. Pa. 1998)(citation omitted). “The ‘polestar’ of the discovery rule is not the plaintiff’s actual knowledge, but rather ‘whether the knowledge was known, or through the exercise of diligence, knowable to [the] plaintiff.’” Bohus, 950 F.2d at 925 (citations omitted). It is important to note that according to the discovery rule, “lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations.” Pocono

Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983)(citations omitted).

The Third Circuit has recognized that when applying the discovery rule, “there are very few facts which cannot be discovered through the exercise of reasonable diligence.” Pitts, 24 F. Supp.2d at 441 (citing Vernau v. Vic’s Market, Inc., 896 F.2d 43, 46 (3d Cir. 1990); Urland v. Merrell-Dow Pharm., Inc., 822 F.2d 1268, 1273 (3d Cir. 1987)). “Once plaintiff is aware of the salient facts, his failure to investigate or to exercise reasonable diligence in the investigation will not prevent the statute of limitations from running.” Id. (citing O’Brien v. Eli Lilly & Co., 668 F.2d 704, 710 (3d Cir. 1981)). Generally, the point of time at which the plaintiff should reasonably be aware that he or she has suffered an injury is an issue of fact to be determined by the jury. Sadtler v. Jackson-Cross Co., 587 A.2d 727, 732 (Pa. Super. 1991)(citations omitted). However, “[w]hen the only reasonable conclusion from the competent evidence of record construed most favorably to the plaintiff is that the time it took for the plaintiff to file suit was unreasonable, summary judgment should be granted.” Pitts, 24 F. Supp.2d at 441 (citations omitted); see also Kingston Coal Co. v. Felton Min. Co., Inc., 690 A.2d 284, 288 (Pa. Super. 1997)(stating that the commencement of the limitations period may be determined as a matter of law “where the facts are so clear that reasonable minds cannot differ as to whether the plaintiff should reasonably be aware that he suffered an injury.”).

#### **a. Application of Discovery Rule**

Spade admits that the statute of limitations for an action for negligence or misrepresentation in Pennsylvania is two years. 42 Pa.C.S.A. §§ 5524(2) and (7). Likewise, Spade concedes that his breach of contract claim is subject to a four year statute of limitations. 42 Pa.C.S.A. § 5525. Without explicitly referring to the discovery rule, or any case law

whatsoever, Spade argues that his state law claims are not barred by the applicable statutes of limitations because he did not suffer any injury until he made his final payment to the IRS for Heintz's delinquent taxes under the settlement agreement. (Spade's Mem. Law Supp. Answ. Molton's Mot. Summ. J.; Spade's Mem. Law Supp. Answ. Crowley's Mot. Summ. J.). In other words, Spade argues that his injury did not occur until August 2000, the date of his final payment under the settlement agreement. (Spade's Mem. Law Supp. Answ. Molton's Mot. Summ. J. at 2-3). The Court disagrees with Spade's assertions and finds that his state law claims are time-barred.

“The discovery rule operates to delay the running of the statute of limitations if a plaintiff exercising reasonable diligence could not know that an injury occurred.” Charowsky v. Kurtz, 2000 WL 1052986, at \*3 (E.D. Pa. July 31, 2000)(citing Baumgart v. Keene Bldg. Prods. Corp., 666 A.2d 238, 241 (Pa. 1995)). “The discovery rule does not, however, delay the running of the statute of limitations if a plaintiff knows [h]e was injured but does not know the full extent of the injury.” Id. (citing Home Indem. Co. v. Alexander & Alexander, Inc., Civ. A. No. 89-7715, 1990 WL 181467, at \*4 (E.D. Pa. Nov. 20, 1990)(stating that applying the discovery rule to delay the running of the statute of limitations until the full extent of the injury is known “would be to bend the discovery rule completely out of its original design”); Jones v. Philpott, 713 F. Supp. 844, 845, 847 (W.D. Pa. 1989)(answering “no” to the question “does the discovery rule suspend the running of the statute of limitations if the plaintiff is aware of an injury caused by the defendant's conduct but is unaware of the full extent of that injury”); Cardone v. Pathmark Supermarket, 658 F. Supp. 38, 40 (E.D. Pa. 1987)(recognizing that the statute of limitations is not tolled if a plaintiff has knowledge of an injury but is ignorant of the severity of that injury);

Sterling v. St. Michael's Sch. for Boys, 660 A.2d 64, 66 (Pa. Super. 1995)(“‘A plaintiff need not know the precise extent of her injuries before the statutory period begins to run.’ Bradley v. Ragheb, 633 A.2d 192, 196 (Pa. Super. 1993).”). Thus, “Pennsylvania law focuses on the happening of the breach and the injured party’s awareness of that breach, not knowledge of damage resulting from the breach.” Hunter v. Jacoby & Meyers Law Offices, Civ. A. No. 94-5200, 1996 WL 221759, at \*3 (E.D. Pa. Apr. 26, 1996), see also Spillman v. Wallen, Civ. A. No. 95-750, 1996 WL 379553, at \* 7 (E.D. Pa. June 28, 1996), aff’d, 111 F.3d 127 (3d Cir. 1997)(stating that the “the discovery rule tolls the statute of limitations until the plaintiff knows or reasonably should know that the defendant breached a duty. It does not toll the statute until the plaintiff knows or reasonably should know that he has sustained damages.”).

Based on the aforementioned, the Court is not convinced by Spade’s argument that he could not pursue his state law claims until he made his final payment to the IRS in August 2000. Besides failing to cite to any authority, Spade does not individually address each state law claim and show why he was unable, through the exercise of reasonable diligence, to become aware of the salient facts of each claim within the prescribed limitations period. Although Spade argues that he was unable to be fully aware of his *damages* until August 2000, he is silent regarding the relevant inquiry of when he discovered or, by exercising reasonable diligence, should have discovered that he had been *injured*, and that this *injury* has been caused by another party’s conduct. New Castle County, 111 F.3d at 1124. The Court notes that it is the plaintiff, who is arguing the applicability of the discovery rule, who bears the burden of proving that he is entitled to the discovery rule exception. Cochran v. GAF Corp., 666 A.2d 245, 249 (Pa. 1995).

In determining whether the plaintiff has met his burden, the court is required,

before applying the exception of the rule, to “address the ability of the damaged party, exercising reasonable diligence, to ascertain the fact of a cause of action.” Pocono, 468 A.2d at 471. With regard to Spade’s state law claims, this Court will determine whether Spade is entitled to the discovery rule exception by individually addressing Spade’s ability, exercising reasonable diligence, to ascertain the fact of each cause of action.

### **1. Negligence Claim**

Under Pennsylvania law, Spade’s negligence claim is subject to a two year statute of limitations. See 42 Pa.C.S.A. § 5524(2). The statute of limitations period begins to run when the alleged breach of duty occurs. Bigansky v. Thomas Jefferson Univ. Hosp., 658 A.2d 423, 426 (Pa. Super. 1995). Spade’s negligence claim is based on the ground that “Defendant(s), as employers and masters of plaintiff, owed plaintiff a duty of care to insure that [he] would not be injured or harmed by their failure to follow established business practices of depositing employee withholding trust fund liability taxes with the Internal Revenue Service.” (Compl, ¶ 36). Spade argues that Defendants “breached that duty by failing to follow established business practices and subjecting the plaintiff to liability and damages while he was acting as their controller.” (Id.). In support of his argument, Spade avers that, as an accounting department employee, he is owed a “safe work environment” which imports the duty of “insuring that all of the payroll tax liabilities of the company are being paid.” (Spade’s Mem. Law Supp. Ans. Crowley’s Mot. Summ. J. at 13). Spade goes on to state that “[h]aving employees perform accounting functions in faltering corporations is equivalent to assigning them to a hazardous work environment.” (Id.).

Upon reading the Complaint and review of the record, Spade’s negligence claim arose when the Defendants allegedly breached their duty by failing to pay the payroll taxes to the

IRS while Spade was Heintz's CFO in 1993. In his affidavit, Spade admits that he became aware that Heintz's federal payroll taxes had not been paid in 1993. (Spade's Answ. Crowley's Mot. Summ. J., Ex. A (Spade's Aff.)). Therefore, it was in 1993, that Spade first became aware that the Defendants allegedly breached their duty of care by failing to pay the payroll taxes to the IRS. As of November 1996, Spade was fully aware of the alleged breach when he received the letter from the IRS assessing a penalty against him for Heintz's unpaid payroll taxes.

As a result of the aforementioned, exercising reasonable diligence, Spade had the ability to ascertain that he had a cause of action for negligence in 1993 and 1996. Applying Pennsylvania's two year statute of limitations to either the 1993 or 1996 dates, the Court concludes that Spade's negligence claim should have been brought in 1995 or, at the very latest, in 1998. 42 Pa.C.S.A. § 5524(2). Spade filed his action on July 3, 2001. As a result, Spade's negligence claim is time-barred. Accordingly, Spade's state law claim of negligence is dismissed.<sup>8</sup>

## **2. Misrepresentation Claim**

Similar to his negligence claim, Spade's misrepresentation claim is subject to a two year statute of limitations. See 42 Pa.C.S.A. § 5524(7). "A cause of action arises when plaintiff knew or should have known of the misrepresentation." Tolbert by and Through Cravins v. W. Atlee Burpee Co., 1991 WL 32827, at \*3 (E.D. Pa. Mar. 8, 1991)(citations omitted).

Spade's misrepresentation claim is based on the grounds that in order to induce Plaintiff into

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<sup>8</sup> Furthermore, in Pennsylvania, the proof required for a *prima facie* case of negligence is (1) that a duty was owed and (2) breached, and (3) that the breach was the cause of the injury (4) resulting in damages to the plaintiff. Watkins v. Hosp. of Univ. of Pennsylvania, 737 A.2d 263, 265-66 (Pa. Super. 1999). In this case, Spade fails to offer any evidence whatsoever showing a *prima facie* case of negligence.

entering into the employment obligations with Defendants, “defendant’s [sic] made express and/or implied representations to Plaintiff that they would comply with the statutory provisions of the Internal Revenue Code and not place him at risk for their failure to pay employee withholding tax . . . .” (Compl., ¶ 40). Spade contends that as a result of these alleged misrepresentations, he “has been damaged and is entitled to damages.” (Id., ¶ 43). Relying again on his unsafe working environment theory, Spade argues that he has been a victim of fraud because employers should make employees fully aware of the extent of their exposure when they “have them working at a job without explaining that conventional employment practices do not apply.” (Spade’s Mem. Law Supp. Ans. Crowley’s Mot. Summ. J. at 13).

Upon review of the record, Spade’s claim is based upon alleged misrepresentations made to Spade in order to induce him into employment. Since Spade began working at Heintz in April 1993, the alleged misrepresentations must have been made sometime during or prior to April 1993. Spade was aware of the alleged misrepresentations that the Defendants “would comply with the statutory provisions of the Internal Revenue Code and not place him at risk for their failure to pay employee withholding tax” as of June 1993, when he knew that the taxes had not been paid. As of November 1996, Spade was fully cognizant of his misrepresentation claim when he received the letter from the IRS regarding nonpayment of the taxes and his presumed liability.

As a result, exercising reasonable diligence, Spade had the ability to ascertain the fact that he had a cause of action for misrepresentation in 1993 and 1996. Applying Pennsylvania’s two year statute of limitations to either the 1993 or 1996 dates, the Court concludes that Spade’s misrepresentation claim should have been brought in 1995 or, at the very

latest, in 1998. 42 Pa.C.S.A. § 5524(7). Spade filed his action on July 3, 2001. As a result, Spade's misrepresentation claim is time-barred. Accordingly, Spade's state law claim of misrepresentation is dismissed.<sup>9</sup>

### **3. Breach of Contract Claim**

As for Spade's contract claim, it is subject to the four year statute of limitations found in 42 Pa. Cons. Stat. Ann. § 5525. 42 Pa.C.S.A. § 5525. The statute of limitations period begins to run from the time of the breach of contract. Romeo and Sons, Inc. v. P.C. Yezbak & Son, Inc., 652 A.2d 830, 832 (Pa. 1995)(citations omitted). Spade's contract claim is premised on the allegation that the actions alleged in the Complaint constitute a breach of contract claim. (Compl., ¶ 47). Specifically, Spade contends that "[t]he Defendant(s) actions . . . constitute a violation of the implied covenant of good faith and fair dealing." (Id., ¶ 49). In support of his contract claim, Spade states that there is "an implied condition of employment that an employer will reimburse an employee for expenses and liabilities they incur while working at that job following the legal directions of their employer." (Spade's Mem. Law Supp. Ans. Crowley's Mot. Summ. J. at 15).

Upon reading the Complaint and reviewing the record, Spade does not provide any evidence of a contract, either express or implied. Relying upon the record and his other state law claims, Spade's contract claim is based on his employment at Heintz. Spade's employment

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<sup>9</sup> Furthermore, under Pennsylvania law, in order "for a plaintiff to prevail on claims for fraud (or intentional misrepresentation) and negligent misrepresentation . . . , he or she must prove justifiable reliance upon the misrepresentation at issue." Benevento v. Life USA Holding, Inc., 61 F. Supp.2d 407, 416 (E.D. Pa. 1999)(footnote omitted). In this case, Spade has not specifically pointed to any misrepresentations. Moreover, Spade has not provided any evidence showing justifiable reliance upon any such misrepresentations. Accordingly, Spade fails to offer any evidence whatsoever proving a *prima facie* case of misrepresentation.

with Heintz concluded in 1993, therefore, the alleged breach of contract must have occurred in 1993. By his own admission, Spade acknowledges that he was aware that the employee withholding taxes had not been paid in June 1993. At the latest, Spade was cognizant of his breach of contract claim in November 1996, when he received the letter from the IRS regarding nonpayment of the taxes and his presumed liability.

As a result, exercising reasonable diligence, Spade had the ability to ascertain the fact that he had a cause of action for breach of contract in either 1993 or 1996. Applying Pennsylvania's four year statute of limitations to either the 1993 or 1996 dates, the Court concludes that Spade's breach of contract claim should have been brought in 1997, and at the very latest, in 2000. 42 Pa.C.S.A. § 5525. Spade filed his action on July 3, 2001. As a result, Spade's breach of contract claim is time-barred. Accordingly, Spade's state law claim for breach of contract is dismissed.<sup>10</sup>

#### **IV. Conclusion**

Spade fails to make the required showing that Molton, RHI and Crowley were responsible for collecting, accounting for, and remitting Heintz's payroll taxes, and that they

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<sup>10</sup> Furthermore, under Pennsylvania law, in order to prove a breach of contract claim "a plaintiff must show: (1) the existence of a valid and binding contract to which the plaintiff and defendants were parties; (2) the contract's essential terms; (3) that plaintiff complied with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) damages resulting from the breach." Nowosad v. Villanova Univ., 1999 WL 322486, at \* 6 (E.D. Pa. May 19, 1999)(citing Gundlach v. Reinstein, 924 F. Supp. 684, 688 (E.D. Pa.1996)(listing elements required in breach of contract case between university and student), aff'd without op., 114 F.3d 1172 (3d Cir. 1997)). In this case, Spade fails to provide any evidence of an existing valid and binding contract. Consequently, Spade has neither provided any evidence that he complied with any contract terms, nor shown that Defendants breached any duty imposed by a contract. As a result, Spade fails to offer any evidence whatsoever showing a *prima facie case* of breach of contract.

willfully failed to do so. See 26 U.S.C. §§ 6672(a) and (d). As a result, Spade's claims for contribution against Molton, RHI and Crowley pursuant to Section 6672 are dismissed. Likewise, Spade's state law claims are also dismissed. Count II of Spade's Complaint, entitled "Liability for Breach of Employer's Duty of Care," is dismissed because the Court cannot find any such claim within Pennsylvania law and the claim is substantively similar to Spade's Count III, entitled "Liability for Negligence." Spade's negligence claim, Count III, is also dismissed. Spade has failed to properly file his action within the prescribed statute of limitations period. Additionally, Spade has failed to establish a *prima facie case* of negligence. Likewise, Spade's misrepresentation claim, Count IV, is dismissed. Spade has failed to properly file his action within the prescribed statute of limitations period. In addition, Spade has failed to establish a *prima facie case* of misrepresentation. As for Spade's breach of contract claim, Count V, it is also dismissed. Spade has failed to properly file his contract claim within the prescribed statute of limitations period. Moreover, Spade has failed to establish a *prima facie case* of breach of contract. Thus, the Motions for Summary Judgment filed by Molton, RHI and Crowley are granted.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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JEROME SPADE,

Plaintiff,

v.

STAR BANK, et al.,

Defendants.

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CIVIL ACTION

NO. 01-3349

**ORDER**

AND NOW, this 6<sup>th</sup> day of November, upon consideration of the Motions for Summary Judgment filed by Defendants Donald C. Molton, Jr. (Dkt. No. 34), Robert Half International, Inc. (Dkt. No. 40) and Clifford Crowley (Dkt. No. 43), and the Responses and Replies thereto, it is hereby ORDERED that:

1. the Motions for Summary Judgment are GRANTED.
2. Defendants Donald C. Molton, Jr., Robert Half International, Inc. and Clifford Crowley are DISMISSED from this action.
3. Spade's state law claims are DISMISSED.
4. The remaining parties, Spade, Star Bank, Ralph D. Ketchum, Philip Rice and James Doyle, shall file their Joint Pretrial Order within fourteen (14) days from the date of this Order.

BY THE COURT:

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Robert F. Kelly,

Sr. J.